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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BOBBY ALONZA JONES, Defendant and Appellant.	F050635 (Super. Ct. No. F04900017-5) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

David R. Mugridge for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Dawson, J. and Kane, J.

INTRODUCTION

Appellant Bobby Alonza Jones contends the trial court abused its discretion when it sentenced him to a total term of 28 years in prison, while sentencing his codefendants to lesser terms. We will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On June 14, 2004, the Fresno County District Attorney filed an information charging Jones with four counts of kidnapping to commit robbery; four counts of kidnapping for carjacking; four counts of home invasion robbery; and one count of assault with a firearm. The information alleged as to all counts that Jones personally used a firearm. It also was alleged as to count 1 that the victim was over the age of 65 years and as to count 13 that Jones personally inflicted great bodily injury on the victim.

Jones initially pled not guilty to the charges. On March 17, 2005, Jones changed his plea of not guilty to a plea of no contest to kidnapping, robbery in concert, and assault with a deadly weapon pursuant to a plea agreement. As part of the agreement, Jones also pled no contest to several enhancements, including gun enhancements under Penal Code section 12022.53, subdivision (b)[1] and section 12022.5, subdivision (a). He additionally pled no contest to a great bodily injury enhancement under section 12022.7, subdivision (c).

Pursuant to the plea agreement, the remaining counts and enhancements were to be dismissed and all terms of imprisonment imposed would be served consecutively. Jones was specifically advised that the "lid will be, then, 29 years in state prison." Jones acknowledged that was his understanding of the plea agreement. Jones was advised that all three counts to which he pled no contest qualified as strikes.

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1 All further statutory references are to the Penal Code unless otherwise specified.

At sentencing the trial court selected the assault charge as the principal term and imposed the middle term of six years. Terms of imprisonment equating to one-third the midterm were imposed for the home invasion robbery and kidnapping counts, with the terms to be served consecutively. Terms of imprisonment also were imposed for the enhancements. The total term of imprisonment imposed was 28 years.

After sentencing Jones moved to recall the sentence, asking that he be sentenced to mitigated terms or, alternatively, to concurrent terms because codefendants had received mitigated or concurrent terms. The People opposed the recall. The trial court denied the motion to recall the sentence.

Jones filed a notice of appeal, which was not timely. This court granted a habeas petition and permitted the filing of a belated notice of appeal. By letter dated February 13, 2007, Jones requested permission to file a supplemental brief raising *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). By order dated March 16, 2007, we granted Jones's request and provided the People with an opportunity to file supplemental briefing.

DISCUSSION

Jones contends the trial court abused its discretion when it imposed the middle term of imprisonment and ordered the terms to be served consecutively. He contends his sentence should be reduced to mitigated terms and/or concurrent terms.

Jones agreed to imposition of a maximum 29-year prison sentence as a condition of the plea agreement; he was sentenced to 28 years in prison. His argument amounts to a collateral attack on the validity of the plea bargain. This is foreclosed absent compliance with section 1237.5. (*People v. Panizzon* (1996) 13 Cal.4th 68, 78-79; *People v. Stewart* (2001) 89 Cal.App.4th 1209, 1220 (*Stewart*).) Jones must obtain a certificate of probable cause before challenging the plea, even though the plea agreement did not specify a particular sentence. (*Stewart*, at pp. 1216-1218.) *Stewart* reasoned that

a challenge to a negotiated sentence, even where the negotiation is only for a maximum possible sentence, as in Jones's case, is an effort to unilaterally improve the terms of the plea bargain. Thus, it is an attack on the validity of the plea bargain and a certificate of probable cause is required. (*Ibid*.) No certificate of probable cause was obtained, and Jones is precluded from challenging the sentence on appeal.

Furthermore, Jones's abuse of discretion contention is essentially a claim that the prison term imposed by the trial court exceeds the bounds of reason. It is a relevant circumstance that the conditions of the plea agreement included vulnerability to a prison term of not more than 29 years. Such agreed sentence vulnerability is tantamount to a stipulation that this term is within the range of reasonableness for the crimes a defendant has committed. (*Stewart, supra*, 89 Cal.App.4th at p. 1215.) We find *Stewart's* logic persuasive and adopt its reasoning and result. Accordingly, "defendant's appeal is meritless or frivolous." (*Ibid*.)

Additionally, neither *Blakely* nor *Cunningham* prohibits the sentence imposed. In *Blakely*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Blakely, supra*, 542 U.S. at pp. 301, 303.) Recently, in *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856], the United States Supreme Court clarified that "In accord with *Blakely,* … the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.]" (*Id.* at p. ___ [127 S.Ct. at p. 868].) The trial court imposed the middle term on all substantive offenses.

The trial court's ability to impose consecutive, as opposed to concurrent, sentences is not precluded by *Blakely* and *Cunningham* because Jones stipulated that the terms of imprisonment would be served consecutively under the plea agreement.

As for the imposition of the upper term of imprisonment on the section 12022.5, subdivision (a) enhancement and one-third the upper term on the section 12022.53,

subdivision (b) enhancement, Jones stipulated to facts that support the upper term. Jones specifically admitted the weapons enhancements. Jones stipulated that the police reports and the testimony at the preliminary hearing provided the factual basis for the plea. By entering into the plea agreement, Jones effectively stipulated that there was a factual basis for the imposition of the maximum that could be imposed within the terms of the plea agreement and that imposition of the lid was lawful. (*People v. Shelton* (2006) 37 Cal.4th 759, 768.) Under *Blakely*, the statutory maximum includes the maximum sentence a judge may impose based on facts admitted by the defendant. (*Blakely*, *supra*, 542 U.S. at p. 303.)

In *People v. Bobbit* (2006) 138 Cal.App.4th 445, the defendant entered into a plea agreement with a sentencing lid. The trial court imposed the maximum term that could be imposed under the plea agreement. (*Id.* at p. 447.) After first noting that the issue was not cognizable on appeal because the defendant failed to obtain a certificate of probable cause, the appellate court noted that imposition of the upper term pursuant to a plea agreement was not precluded, citing *People v. Shelton, supra,* 37 Cal.4th 759. As the California Supreme Court stated in *Shelton*:

> "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Id.* at p. 768.)

In *People v. Hill* (2004) 119 Cal.App.4th 85, the defendant pled guilty to substantive offenses and to firearm enhancements, including an enhancement pursuant to section 12022.5, subdivision (a). (*Hill*, at p. 87.) The defendant challenged the imposition of one-third the upper term for the gun enhancement appended to the subordinate count. (*Ibid.*) The appellate court concluded that the trial court could choose

from among the three terms in calculating the sentence on the enhancements on subordinate counts. (*Id.* at p. 92.)

In conclusion, Jones is precluded from challenging his sentence on appeal because he failed to obtain a certificate of probable cause. Alternatively, the sentence imposed is within the maximum specified under the plea agreement and was stipulated to by Jones; it cannot be challenged, therefore, as an abuse of discretion. Finally, the sentence does not violate *Blakely* or *Cunningham.*

DISPOSITION

The judgment is affirmed.